LIABILITY FOR SUBSTANTIAL PHYSICAL DAMAGE TO LAND BY BLASTING— THE RULE OF THE FUTURE. II[1]

"WHAT," it may be asked, "do you say as to the apparently overwhelming weight of authority which is generally understood as being opposed to your conclusions?"

An answer to this question involves the consideration of: (1) the so-called "historic reason"; (2) statements of legal text-writers, essayists, and annotators, purporting to be founded on actual decisions; (3) actual decisions which are often supposed to be based on the old rule of absolute liability.

So far as relates to cases where the blast throws tangible substances upon plaintiff's land or person, there is a so-called "historic reason" to be considered. We do not think it is now entitled to weight, but it still exerts influence in some decisions. In Hepburn's Cases on Torts,[2] the learned editor speaks of "the historic reason for the distinction taken, because of the technical trespass, in Hay *v.* Cohoes Co. and Booth *v.* Railway Co. . . ." And he quotes from the note in 27 HARVARD LAW REVIEW,[3] where the annotator, after saying that "there seems no sufficient reason for distinguishing these two classes of cases," further says: "Probably the reason for the distinction is that the courts have felt themselves fettered by precedent in the case of the technical trespass, and yet have been unwilling to extend the doctrine to the vibration cases." Some courts are inclined to act (almost unconsciously, as it were) upon the untenable theory that the old law of procedure (the law which once was undeviatingly applied under the old forms of action) still exercises a controlling influence upon the substantive law of the present day.

Trespass was the form of action to recover for damage directly done by force. The law excluded "all consideration of the fault

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[1] Continued from February Number, 33 HARV. L. REV. 542.

[2] Page 43, note.

[3] Pages 188–189.

or negligence of the person who is held liable." No consideration was taken of the moral quality of the act which resulted in damage.

"The theory of trespass for many hundred years may be shortly summed up by saying that the conception of negligence is unknown to the law of trespass. . . . so far as the immediate consequences of a man's acts are concerned, he is civilly liable regardless of the state of his mind, and consequently the absence of an intent to do the harm or the absence of negligence is no defense. This proposition, taken with the qualification that civil liability is strictly limited to such consequences as are immediate, constitutes the original common-law theory of trespass." [4]

An action of trespass was the appropriate form of procedure in a case of entry upon real estate, and it was regarded as necessarily carrying with it the idea of absolute liability. The former (taken for granted) substantive law of absolute liability was treated as if it were an inseparable accompaniment to that form of action. Hence, if the remedy upon a given state of facts (if there *were* any remedy) was an action of trespass, it was supposed that the doctrine of absolute liability must necessarily be enforced therein. The court would merely have said "that the defendant was liable because he was guilty of a trespass and liability in trespass is absolute." [5]

This was the law in the days (not long gone by) when "The form of procedure was considered the principal thing, and the substantive law was viewed as a mere incident to procedure." [6] "Formerly the law of procedure almost monopolized attention, so that questions of substantive law received very scant consideration. . . . The forms of action are given, the causes of action must be deduced therefrom." [7] "So great is the ascendency of the Law of Actions in the Infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." [8]

And, "further, to a very considerable degree the substantive law administered in a given form of action" had "grown up independently of the law administered in other forms. Each pro-

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[4] See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 74–77.

[5] *Ibid.*, 82–83.

[6] 1 ENCYCLOPAEDIA LAWS OF ENGLAND, 2 ed., Pollock's Introduction, 4.

[7] MAITLAND, EQUITY AND FORMS OF ACTIONS, 300.

[8] MAINE, EARLY LAW AND CUSTOM, Eng. ed. 1883, 389.

cedural pigeon-hole" contained "its own rules of substantive law." [9] The law of torts had "in fact been developed by a series of disconnected experiments with the various forms of action. . . ." [10] In 1886 Sir Frederick Pollock said that the "really scientific treatment of principles" in Torts "begins only with the decisions of the last fifty years." [11]

But at the present day the former situation is reversed. Now substantive law is regarded as the principal thing, and procedure is viewed as a mere incident thereto.[12]

Professor Wigmore [13] calls attention to "the necessity, every day drawing nearer, of adjusting the treatment of our substantive law to the abolition, already largely accomplished, of the forms of action and classes of writs in Tort . . ." But though substantive law *ought* no longer to be "controlled by the forms of procedure," courts are slow to adopt and act upon this obvious truth. The "ideas and phrases connected with old forms [of action] still exert an influence." Professor Salmond says:

"Forms of action are dead, but their ghosts still haunt the precincts of the law. . . . We are still called upon to observe distinctions and subtleties that have no substance or justification in them, but are nothing more than an evil inheritance from the days when forms of action and of pleading held the legal system in their clutches." [14]

At the present day, when the question before a court is, whether to retain or repudiate the old doctrine of holding a non-culpable defendant absolutely liable, it is erroneous to argue that the old doctrine must be retained and enforced; because the defendant, *if liable at all*, would have been answerable in trespass, or because trespass would have been the proper form of action *if his conduct had been wrongful*. The primary question now is, whether he ought to be held liable at all in any form of action whatever.

Next, as to the statements of legal text-writers, essayists, and annotators.

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[9] MAITLAND, EQUITY AND FORMS OF ACTION, 298. Compare Professor Williston, "Liability for Honest Misrepresentation," 24 HARV. L. REV. 415.

[10] See Sir Frederick Pollock, 27 ENCYC. BRIT., 11 ed., 64.

[11] Introduction to first edition of POLLOCK ON TORTS, vii.

[12] See, quoted *ante*, MAITLAND ON EQUITY AND FORMS OF ACTION, 375.

[13] "The Tripartite Division of Torts," 8 HARV. L. REV. 200, 209.

[14] 21 L. QUART. REV. 43; see fuller quotation, 30 HARV. L. REV. 245.

By some of these writers, the application of the doctrine of absolute liability is certainly overstated. Take, for instance, the alleged rule of absolute liability in cases where blasting throws rocks (or other tangible substances) upon plaintiff's land or person. An excellent text-book asserts that the rule of absolute liability in such cases is "universal." [15] Yet the application of the rule depends (*inter alia*) upon the locality. In the same state, where liability for blasting, resulting in such damage, if done in the midst of a populous city, is asserted to be absolute, it is held that liability for blasting in a secluded locality, far from human habitations, may be imposed only in case of negligence. As to this, compare with each other two cases in California: *Munro* v. *Pacific Coast Dredging, etc. Co.*,[16] and *Houghton* v. *Loma Prieta Lumber Co.*[17] Compare also with each other two Washington cases: *Freebury* v. *Chicago R. R.*, [18] and *Kendall* v. *Johnson.*[19]

If a client asks the question, Is a defendant blasting on his own land liable for damage thereby done to the land or person of his neighbor? no good lawyer would undertake to answer without first having all attainable information on the specific case as to the locality of the blasting, and as to all the surrounding circumstances, including the quantity and quality of the explosives used, and the manner of operating the blast. If we look to isolated sentences in judicial opinions, we are liable to get seemingly contradictory answers to the above abstract question, presented as it were *in vacuo*. These seeming contradictions must be construed in the light of the specific facts before the court in the respective cases.

Good lawyers sometimes state the law in the literal language of judicial opinions, without analyzing the underlying reasons, which are often unexpressed by the court. See, for example, Professor Ames "Cases on Torts," page 76, note 1.[20]

In 30 HARVARD LAW REVIEW [21] the present writer said, as to the liability for blasting, "when substances are thereby thrown on the

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[15] 3 SHEARMAN & REDFIELD ON NEGLIGENCE, 6 ed., § 688 *a*.

[16] 84 Cal. 515, 527, 24 Pac. 303 (1890).

[17] 152 Cal. 500, 504, 506, 93 Pac. 82 (1907).

[18] 77 Wash. 464, 467, 137 Pac. 1044 (1914).

[19] 51 Wash. 477, 99 Pac. 310 (1909). See also Sanborn, J., in Cary Bros. *v.* Morrison, 129 Fed. 177, 180 (1904).

[20] 3 ed., 1910.

[21] Page 330.

land of plaintiff": "In such a case the great weight of authority imposes absolute liability." But it will be noticed that this statement does not assert that such result is correct on principle; nor does it assert that the conclusion said to be reached by authority is to be regarded as a permanent and final rule. On the contrary, the writer, later on in the same article, indicates his view as to "the possibility, not to say the probability," and (*semble*) the desirability, of a change in the law as to this matter.[22]

The assertion — that the rule of absolute liability, where blasting throws tangible substances upon plaintiff's land is "universal" — is in conflict with the decision in *Klepsch* v. *Donald*.[23] In that case, by defendant's blasting, a rock was thrown crashing through the roof of Klepsch's house and fatally wounding him. The rock was thrown between nine hundred and forty and twelve hundred feet. The distance was "the very extreme of distances to which rocks could be thrown in that manner, being more than three times the distance to which they were usually thrown." [24] Upon the first trial, the judge took the question of negligence from the jury, instructing them to find for plaintiff if the rock came from the defendant's blast. A verdict for plaintiff was set aside, the court holding that there was no evidence that it was unreasonable or negligent for the defendant to attempt to blast at that particular place, in case the operation was properly conducted. Upon a second trial, the court, holding that there was evidence sufficient to justify the jury in finding that the blasting operation was carelessly conducted, left the question of negligence to the jury. A verdict was found for plaintiff on this question, and judgment was rendered thereon.[25]

In 1 Bohlen's Cases on Torts,[26] Professor Bohlen, after stating the rule in *Hay* v. *Cohoes Co.*, — that one who, by blasting, casts *débris* upon the land of another, is liable irrespective of negligence, — says: "*In Klepsch* v. *Donald*, 4 Wash. 436 (1892), it is held this only applies where the *débris* is cast upon nearby property . . ." In 19 Cyclopædia of Law and Procedure,[27] after stating the rule of

[22] See 30 HARV. L. REV. 420, 424.

[23] 4 Wash. 436, 30 Pac. 991 (1892).

[24] See 8 Wash. 162, 165, 35 Pac. 621 (1894).

[25] Klepsch *v.* Donald, 8 Wash. 162, 35 Pac. 621 (1894).

[26] Page 611, note 2.

[27] Page 7.

absolute liability in cases like *Hay* v. *Cohoes Co.*, the editor refers to *Klepsch* v. *Donald*, "where, although this doctrine was not repudiated, the circumstances of the case took it without the rule."

A more important question remains. "How do you deal with the formidable list of *actual decisions* which are generally supposed to adopt (and, indeed, sometimes do, in literal terms, adopt) the old rule of absolute liability?" [28]

To this question there are two answers:

First: In a large proportion of these cases the decision is, in reality, founded on the existence of negligence.

Second: In most of the cases where the decision in favor of plaintiff does not appear to have been based on the existence of negligence; yet it could have been based on that ground; and such a view would not bring about a different result from that which was actually reached.

Here, to avoid confusion, it is necessary to distinguish between two kinds or descriptions of negligence.[29] We have previously said [30] that the negligence which involves liability "may consist (1) in making an attempt to blast at all, at the time and place in question; or it may consist (2) in negligently conducting blasting operations when undertaken at a proper time and place." For convenience of reference, (1) may be called negligence of the first description, and (2) may be called negligence of the second description.

This distinction has already been stated by more than one writer; and it is so important that we here quote their language.

"Section 765. DECISIONS WHICH PROCEED UPON THE PRINCIPLE OF NEGLIGENCE. — An examination of the decisions where damages have been claimed for injuries sustained by blasting, will show that by far the greater number of them proceed upon the inquiry whether there was negligence either (1) in doing the work at all, in the place where and at

[28] This list includes not only most of the cases where tangible objects have been thrown upon the premises, but also many of the recent cases where the damage is done by vibration or concussion.

[29] Perhaps it would be more accurate to speak of distinguishing between two different subject matters as to which negligence is alleged to exist.

[30] 33 HARV. L. REV. 549.

the time when it was done, — that is to say, whether the work was a nuisance, and consequently in theory of law negligence *per se;* (2) whether, although not a nuisance *per se* or negligence *per se*, it was done in a negligent manner, — that is to say, without taking those precautions necessary to safeguard the persons or property of third persons in the vicinity. It is obvious, upon a moment's reflection, that the work of blasting rocks, being absolutely necessary in excavating through beds of rock, in mining, in digging wells, in excavating foundations for buildings, in improving roads and streets, in digging canals, and in building railways, cannot under all circumstances be regarded as a *nuisance per se* and condemned as being negligent as matter of law. . . ." [31]

". . . if a person is guilty of a wrong in blasting in a particular locality, no degree of care in the actual conduct of the blast will excuse the primary tort. . . . The negligence may consist as much in blasting at all, as in failure to use due care in operating the blast. For the person must use due care in determining whether the locality is a proper place for blasting, as well as in the actual blasting itself." [32]

In other words: It is no defense that the blasting operations "were *in themselves* carefully and skilfully performed, if, having regard to the danger thereby incurred by the plaintiff, it was a negligent act to undertake them at all." [33]

Confusion is sometimes caused by the failure of judges to notice these distinctions. A judge often speaks as if there were but one description of negligence, and as if that one were what we call the second description. When he says the plaintiff may, in a particular case, recover without proving negligence, he often means without proving negligence of the second description. And his real reason is found in the fact that the plaintiff has already proved negligence of the first description.

A good illustration is afforded by the following passage in 1 Thompson on Negligence:[34]

"Where the work of blasting is done in a situation where it is necessarily dangerous to the public, as in a thickly settled portion of a city, whereby a person is killed or injured, damages are recoverable for such

[31] 1 THOMPSON ON NEGLIGENCE, § 765. In note 43 various authorities are cited by the author as sustaining the above view.

[32] E. B. THOMAS ON NEGLIGENCE, 2 ed., 2060.

[33] See language used by SALMOND ON TORTS, 4 ed., 280, note 10, as to disturbances of right of support of soil.

[34] § 764.

injury or death without proof of negligence, and notwithstanding proof that the person or corporation so firing the blast, employed skillful and experienced men and exercised the highest degree of care. The reason is that in such a case the work itself is so inherently dangerous that the doing of it, no matter how carefully, is of itself negligence; so that no amount of care in doing the negligent act will excuse the actor from the responsibility of the consequences which grow from it."

Here, when the author says that damages are recoverable "without proof of negligence," he obviously means — without proof of negligence of the second description. And his reason is that the plaintiff has already proved negligence of the first description, which clearly establishes his right to recover.

For a case where this distinction is recognized and stated in the opinion of the court, see Sears, J., in *Fitzsimons & Co.* v. *Braun.*[35]

There are two recent blasting cases where the damage resulted solely from the vibration of the earth or the concussion of the atmosphere, and where negligence has been said not to be an element of an action. In one case it is said that negligence need not be alleged;[36] and in the other case it is said that negligence need not be proved.[37]

In these cases, the court in thus using the term "negligence" seems to have in mind only what we have called negligence of the second description; *viz.*, want of care in conducting the blasting operation.

[35] 94 Ill. App. 533 (1900); decision affirmed in 199 Ill. 390, 65 N. E. 249 (1902). Sears, J., pages 535–536: "If, when the use is lawful, even though naturally dangerous in probable consequences, no liability can be predicated save upon a negligent manner of use, then this cause was submitted to the jury upon an erroneous theory of law. If, however, the contractor who makes use of a dangerous explosive in the ground near the property of another, and when a natural and probable, though not inevitable, result of such use is injury to such property, is liable for the resulting injury irrespective of the degree of care exercised in the handling or exploding of the substance, then the case was properly submitted and the recovery may be sustained." Sears, J., page 542: "We do not regard the evidence as insufficient to sustain the recovery under the allegations of the narr. It is true that it is alleged in each count that the defendant negligently used the explosive. But the charge is not confined to the manner of handling the explosive, but goes to the negligence of any use of it, however careful the particular method of handling, which naturally caused an injury to another. While there is no evidence to establish any negligence in the specific manner in which the explosive was handled, yet the evidence does establish that negligence which the law imputes to an act by which the property of another will naturally and probably be caused a consequential injury. We are of opinion that there is no variance."

[36] Louden *v.* City of Cincinnati, 90 Ohio St. 144, 106 N. E. 970 (1914).

[37] Watson *v.* Mississippi River Power Co., 174 Iowa, 23, 156 N. W. 188 (1916).

In reality, the plaintiff in these cases has alleged and proved facts which show what we call negligence of the first description; *viz.*, blasting at a time and place when a man of average prudence ought to have foreseen the danger; and hence, if he acted in oblivion or disregard of it, he must often be regarded as having acted negligently. It makes no difference that the judges do not call such conduct by the name of negligence. They may describe it only by the general term "wrongful," without specifying the particular nature of the tort. Or they may say that the defendant, in blasting, has been making an unreasonable use of his land. But whatever names they employ, the conduct they are describing can fairly be classed under the general head of negligence.

This is apparent from the language used in the opinions.

Thus, in 174 Iowa,[38] Weaver J., after stating the pleadings in 90 Ohio State,[39] says:

"The court [meaning the Ohio court] states the question to be whether the owner of property may make use of powerful explosives on his own premises in the accomplishment of a lawful purpose, provided he uses due care, notwithstanding the fact that the necessary or natural or probable result thereof is to injure or destroy adjacent property. This, it will be seen, is precisely the proposition we have now before us."

Weaver, J.,[40] then quotes from the opinion of the Ohio court, sustaining the right of action. After referring to the maxim "*Sic utere tuo ut alienum non lædas*" as established law, the Ohio court says:

"But it must be conceded that this is no longer the law, if the owner of a lot may employ such means in the improvement in the use of his property as will naturally and necessarily result in the destruction of adjoining property. . . . If the means employed will, in the very nature of things, injure and destroy his neighbor's property, notwithstanding the highest possible care is used in the handling of the destructive agency, the result to the adjoining property is just as disastrous as if negligence had intervened."

When the courts speak, as they do in some of the above cases, of damage as being the "necessary and probable and natural result"

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[38] Watson *v.* Mississippi River Power Co., 174 Iowa, 29, 156 N. W. 188 (1916).

[39] Page 144.

[40] 174 Iowa, 23, 29, 156 N. W. 188 (1916).

of defendant's conduct, they must generally be taken to mean that his conduct was negligent.[41] It is implied that he foresaw, or ought to have foreseen, the consequences. If so, he would generally be liable for them.[42] A "necessary result" cannot mean less than "a highly probable result." And the phrase "a natural result," although not literally meaning "a probable result," is not infrequently used in that sense.[43] Certainly, one who attempts blasting where "the necessary and natural and probable result" is the destruction of a neighbor's property, must generally be guilty of negligence of the first description.

The different impressions made upon legal readers by the decisions, as to liability for damage produced exclusively by vibration or concussion, are well brought out in the following conflicting passages, placed in parallel columns:

"The trend of the majority of the recent decisions on the question is toward the rule that person causing blasting to be done is liable for injuries to the property of another caused by the concussion or vibration resulting therefrom, irrespective of the question of negligence, and although there is no actual physical invasion of the property thus injured." [44]

"Our study of the opinions of the different courts on this subject yields the belief that when trespass or continuous injury is absent, liability for injury due to an explosion occurring in the conduct of a business depends on negligence, and that most courts expressly or impliedly proceed on this theory, although occasionally they differ as to what is sufficient proof of negligence, and dispose of the case in a manner which disguises the fact that negligence is regarded as essential to a recovery." [45]

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[41] For equivalent expressions, generally to be understood as meaning negligent conduct, see the following: "an unreasonable, unusual, and unnatural use of his own property, which no care or skill in so doing can excuse him from being responsible to the plaintiff for the damages . . . he ought to have known that by such an act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence." Foote, Com., in Colton *v.* Onderdonk, 69 Cal. 155, 158–159,

[42] A defendant, who has only been making a reasonable use of his own land, may not be liable merely because he foresaw the damage which would thereby be caused to his neighbor. But, in most cases of serious damage done by blasting, the defendant has exceeded his right of reasonable user; and, if he foresaw, or ought to have foreseen, the damage, he will be adjudged negligent.

[43] See 25 HARV. L. REV. 115.

[44] From ANN. CAS., 1916 C, 1176, note.

[45] From 123 Am. St. Rep. 581, note.

We prefer the second passage to the first.

If, now, leaving on one side the cases where damage is produced exclusively by vibration or concussion, we take the case where blasting has thrown tangible substances upon the land or person of another, negligence will be found to exist in a very large majority of cases. The casting of tangible substances upon plaintiff's land or person will generally furnish evidence that defendant was negligent; either (1) in making an attempt to blast at all at the place in question, even though the blasting operation was conducted with care; or, (2) in carelessly conducting the operation. In most cases, plaintiff may fairly insist that defendant shall take one or the other horn of the following dilemma. If defendant admits, or if the jury find, that it was negligent to blast at all at the place, he is liable for the consequences. On the other hand, if defendant contends that it was proper to blast at that place if the operation was conducted with care, the result generally furnishes evidence to show that the operation was carelessly conducted; *e. g.*, using an excessively heavy charge of explosive, or failing properly to cover the blast. We think that the first supposition will prove well founded in a large proportion of instances; but that, if the first is not well founded, the second generally will be.

As cases of this kind have heretofore generally been disposed of on the theory of absolute liability, the question as to what would constitute evidence of negligence has not usually been considered. But in some instances, especially where a plaintiff, in his declaration, has made negligence the gist of his complaint, the courts, though deeming the allegation of negligence unnecessary, have considered the question as to what would be proof of negligence. And they have said that, if the blast has thrown *débris* upon plaintiff's land or person, that would generally be competent evidence to be submitted to the jury as sustaining the allegation of negligence (*i. e.* negligence of one or the other of the above descriptions). Authori-

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10 Pac. 395 (1886). ". . . where such an explosion could not take place without strong probability of its injuring some one." Thornton, J., in Munro *v.* Pacific Coast Dredging Co., 84 Cal. 515, 527, 24 Pac. 303 (1890). ". . . when the natural and probable, though not the inevitable, result of the explosion is injury to such property of the other . . ." Boggs, J., in Fitzsimons *v.* Braun, 199 Ill. 390, 393, 65 N. E. 249 (1902). " . . . when he makes use of such means as will naturally, necessarily or probably result in the destruction of property, . . ." Donahue, J., 90 Ohio St. 144, 153, 106 N. E. 970 (1914).

ties in favor of permitting recovery on the second ground are given in the note below.[46]

[46] In Ulrich *v.* McCabe, 1 Hilton (N. Y. Com. Pleas), 251 (1856), "some stones were thrown upon the plaintiff's house." Brady, J., pp. 252–253: "It does not appear, however, that the blast was properly covered. . . . If the blast, indeed, had been *properly* covered, the damage sustained by the plaintiff, probably, would not have resulted. . . . In such a case, the fact of the accident raises a presumption that the blast was not properly covered."

In Wiggins *v.* Hiawassee V. Ry. 171 N. C. 773, 89 S. E. 18 (1916), "the force of the blast threw pieces of stone over on plaintiff's land and about his house." Damage was also done by shaking or jarring the house. Four grounds of negligence were alleged (including an excessively large charge of dynamite, and failure to take proper care against injury by the blast). Per Curiam, p. 775: "We are of opinion that there is abundant proof of negligence (even if proof of negligence be necessary where such a trespass is committed upon the property and rights of another) to justify the submission of the issues to the jury."

In Rafferty *v.* Davis, 260 Pa. St. 563, 103 Atl. 951 (1918), when plaintiff was sitting at the window of her house, a rock blown from defendant's premises crashed through the window and severely injured her. The specific negligence alleged against defendant was, use of an overcharge of powder and failure to use due care to safeguard the vicinity from flying pieces of rock. Potter, J., said (p. 565), that if the plaintiff's evidence was credited, "it was sufficient to justify an inference by the jury that the blast was the result of an overcharge, and to warrant a finding of negligence upon that ground." (See also pp. 566, 567.) In a later part of the opinion, pp. 567–568, Potter, J., said, that if the blast threw rock on plaintiff's land, defendant would be responsible irrespective of negligence, citing 253 Pa. St. 262, 264.

In 1 THOMPSON, NEGLIGENCE, § 770, it is said: "In conformity with the maxim *res ipsa loquitur*, it is generally held that the fact that damage is done by throwing rock or débris upon the premises of an adjacent owner by blasting, is of itself *primâ facie* evidence of negligence, in not properly covering the blast, or in using explosives of unnecessary power, or in the manner of loading the blast. . . . Under the operation of this principle, the mere fact of the injury taking place by reason of the firing of the blast takes the question of negligence *to the jury*, and it is for them to say whether inference of negligence is repelled by the surrounding circumstances or by the defendant's evidence."

In Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991 (1892), and 8 Wash. 162, 35 Pac. 621 (1894), stated *ante*, p. 671, the blast threw rocks on plaintiff's land; the rocks being thrown "more than three times the distance to which they were usually thrown." The court declined to apply the doctrine of absolute liability, holding that there was no evidence that it was unreasonable or negligent for the defendant to attempt to blast at that particular place in case the operation was properly conducted. But the court held that there was evidence sufficient to justify the jury in finding that the operation was carelessly conducted; and, upon the second trial, left the question of negligence in this respect to the jury, who found for plaintiff. Stiles, J., 8 Wash. 165, said: "The very fact shown in the case that, in general, the rocks from defendant's blasts did not fly half as far as these particular rocks, certainly tended to show that there must have been an unusually heavy charge behind these rocks, or that some less than usually efficient means was taken to prevent their flight to such a prodigious distance." As to the application of the doctrine of *res ipsa loquitur*, see 4 Wash. 439, and 8 Wash. 163–165.

As to this case, Professor Bohlen, in 1 CASES ON TORTS, 611, note 2, after saying

Here we might consider the defense of necessity, or reasonable user, sustained by Andrews, C. J., in *Booth* v. *Railroad*,[47] and contrast his views with the comments made thereon by Rumsey, J., in the subsequent case of *Hill* v. *Schneider and Bradley*.[48]

In *Hill* v. *Schneider and Bradley*,[49] plaintiff was tenant of a building belonging to Schneider. Bradley was a contractor, excavating for the erection of a large building by Schneider in the vicinity of the building tenanted by plaintiff. The house occupied by plaintiff had already been seriously damaged by defendant's blasting. Nothing had been thrown upon plaintiff's premises, but substantial damage had been done by jarring, etc. Defendant Bradley proposed to let off further blasts, which were almost certain to do similar damage to a greater extent. The court granted an injunction against Bradley.

Rumsey, J.:[50]

"The course of work pursued by Bradley is not necessary to the making of the excavation, but it is easy to do it in a different way with the use of smaller blasts so as not to injure the wall of the plaintiff's building, although at perhaps a somewhat greater cost to the contractor, and such is the usual way of doing that work where there is danger of injuring a neighbor's premises. . . ." [51]

In the Booth case, the defendant was a railroad corporation, authorized to construct a road. It obtained the consent of the municipal authorities to cross a street by a tunnel or cutting. It became necessary, in order to comply with the conditions imposed by the city authorities, that the defendant's roadbed at the crossing should be depressed fifteen feet below the surface of the street. The soil extended about ten feet below the surface, and underlying that was rock. The defendant company loosened the rock by blasting with gunpowder. In consequence of this blasting, the plaintiff's house on an adjoining lot was seriously damaged, the foundations being cracked, the beams and joists pulled apart, and the plaster

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that the absolute liability rule of Hay *v.* Cohoes Co. "only applies where the debris is cast upon nearby property," adds: "where it is cast to an abnormal distance, while the liability depends on proof of negligence, this circumstance shows a *primâ facie* case."

[47] 140 N. Y. 267, 35 N. E. 592 (1893).

[48] 13 N. Y. App. Div. 299, 43 N. Y. Supp. 1 (1897).

[49] *Ibid.*

[50] *Ibid.*, 304.

[51] Compare Bacon, V. C., in Arnold *v.* Furness R. Co., 22 Weekly Rep. 613 (1874).

loosened. The jury found that the damages to the house from the blasting amounted to $1750. No rocks or materials were thrown upon the plaintiff's lot or against his house. The inference was that the damage to the plaintiff's house was caused by the jarring of the ground or the concussion of the atmosphere created by the explosion, or by both causes combined. "It was substantially conceded,[52] that the defendant exercised due care in conducting the blasting, and that it was necessary in order to remove the rock." From concessions it was assumed [53] "that blasting was the only mode of removing the rock practically available; that it was conducted with due care; and that it was necessary to enable the defendant to conform the roadbed to the established grade." The trial judge instructed the jury that the defendant in using powerful explosives in blasting the rock "used them at its peril," and that if the plaintiff's home was injured thereby, the defendant was liable for the damages occasioned and "that it made no difference whether the work was done carefully or negligently."

Exceptions were taken to these instructions. After verdict for plaintiff, a motion for a new trial was denied, and judgment was entered. On appeal by defendant at the General Term of the Supreme Court for the Fifth Department, three judges concurred in overruling the exceptions.[54] But upon appeal to the Court of Appeal, the exceptions were sustained, the judgment of the General Term was reversed, and a new trial ordered.[55]

It appears that, on the argument of the Booth case, the defendant's counsel had substantially conceded that the blasting was "necessary" in order to remove the rock; and that it was "necessary" in order to enable defendant to adapt his premises to a lawful use. Andrews, C. J., appears to have argued that counsel, by making these concessions, had worked no harm to their client; because these positions, even if not conceded, would have been sustained by the court as effectual defenses. Portions of his opinion

[52] 140 N. Y. 267, 269, 35 N. E. 592 (1893).

[53] *Ibid.*, 274.

[54] 44 N. Y. St. 9, 17 N. Y. Supp. 336 (1892).

[55] 140 N. Y. 267, 281, 35 N. E. 592 (1893).

One of the headnotes to this last decision in 1 ABBOTT'S NEW YORK CYCLOPEDIC DIGEST, 210, § 23, is as follows: "An adjoining landowner improving his land is under obligation to do no unnecessary damage to his neighbor's dwelling, but he has the right to use all necessary and usual means to adapt his land to any lawful use, though the means may endanger his neighbor's house."

and of the subsequent criticisms of Rumsey, J., are given in the note below.[56]

This defense, that the blasting was "necessary," is, in effect (and is so treated by Andrews, C. J.), a contention that defendant, in blasting on his own land, was only making a reasonable, and hence lawful, use of his land (was reasonably using his right of ownership in his land). And this contention is virtually sustained by Andrews, C. J.

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[56] "The rocky surface of the upper part of Manhattan island makes blasting necessary in the work of excavation, and, unless permitted, the value of lots, especially for business uses, would be seriously affected. May the man who has first built a store or warehouse or dwelling on his lot, and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing when he comes to build on his lot adjoining, on the ground that by so doing his own structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property, to the serious injury of the owner, and prevent or tend to prevent the improvement of property. The first occupant in building on his lot exercised an undoubted legal right. But his prior occupation deprived his neighbor of no legal rights in his property. The first occupant acquires no right to exclude an adjoining proprietor from the free use of his land, nor to use his own land to the injury of his neighbor subsequently coming there." (After citing authorities): "The fact of proximity imposes an obligation of care, so that one engaged in improving his own lot shall do no unnecessary damage to his neighbor's dwelling; but it cannot, we think, exclude the former from using the necessary and usual means to adapt his lot to any lawful use, although the means used may endanger the house of his neighbor."

Andrews, C. J., 140 N. Y. 267, 278, 35 N. E. 592 (1893).

In Hill *v.* Schneider and Bradley, 13 App. Div. 299, 305, 306, 43 N. Y. Supp. 1 (1897), after stating the special concessions made in the Booth case, and after saying that that case was decided upon these special facts, Rumsey, J., says:

"But the rule laid down in that case, while supposed by the court to be necessary for the protection of persons improving their land, ought not to be extended so as to give those persons the privilege of unnecessarily destroying the buildings of their neighbors. It is undoubtedly true, as stated in that case, that one is not to be prevented from improving his own premises because a building has been erected by his neighbor upon an adjoining lot. It is equally true that one who has a building upon his own premises is not to be punished for having improved his land by permitting his neighbor, who has not improved his lot, to shake down the building first built so that another one may be erected alongside of it. Such a rule of law would operate just as much to prevent the improvement of land as the rule which was repudiated in the case of Booth *v.* R. W. & O. T. R. R. Co. The true rule must be that, while any person is at liberty to improve his own land, yet in the doing of that he must use every practicable means to avoid injury to his neighbor, and he will not be permitted by the use of powerful explosives upon his own land to injure the house of his neighbor. Certainly is this so when, by the use of smaller quantities of the explosives or in some other way, even at a greater expense, he can avoid such a result. In this case it is very clear that the blasting in the way proposed to be done by Bradley is not necessary, even within the exceedingly broad rule in favor of builders laid down in the Booth case (*supra*)."

In this we think that Judge Andrews was mistaken. While he professes to admit that in determining the question of reasonableness the interest of defendant alone is not the only thing to be considered, but that the interest of the other party is also to be regarded, yet we think that he gave undue weight to the interest of the defendant, and that he should have held that the defendant's user in that case was unreasonable; or, at the least, should have held that the question of reasonableness ought to be submitted to the jury. Mr. Lewis says that the decision in the Booth case "would seem to be fairly open to criticism." [57]

The fact that substantial damage has resulted, or the fact that such a result was foreseeable, does not conclusively establish the unreasonableness of the user. But these facts are both circumstances to be weighed in determining whether the user was unreasonable. And in a very large proportion of blasting cases they would have great and practically controlling weight.[58]

It is well settled that to determine whether a user was reasonable the interest of *both* parties must be considered.[59]

As to attempts to justify on the ground that the mode of user adopted saves expense to the blaster, see authorities given in the note below.[60]

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[57] See 9 LEWIS AM. R. R. & CORP. REP., 103.

[58] 17 COL. L. REV. 387.

[59] THEOBALD, LAW OF LAND, 62; Carpenter, J., Rindge *v.* Sargent, 64 N. H. 294–295, 9 Atl. 723 (1886); Loomis, J., Hurlbut *v.* McKone, 55 Conn. 31, 42, 10 Atl. 164 (1887); 17 COL. L. REV. 390–393.

[60] "In none of these cases where negligence is alleged and proved, could the answer be admitted, that the profits of the business carried on would not justify the extra expense. It is not the matter of profit or loss that determines or enters into the question of care or negligence, but rather that of danger to the public or third persons. . . . If mining at a particular place cannot be profitably carried on, and at the same time the rights of third parties be respected and protected, then it must be carried on at a loss or abandoned." Marston, J., in Beauchamp *v.* Saginaw Mining Company, 50 Mich. 163, 171, 15 N. E. 65 (1883). In this case, it was a question whether, in blasting in an open mine, the pit ought not to be covered before firing the blast.

"He will not be permitted, by the use of powerful explosives upon his own land, to injure the house of his neighbor, especially when he can avoid such a result by the use of smaller quantities of the explosives, or by pursuing some other way, even though the expense would be greater." Gildersleeve, J., in Stevenson *v.* Pucci, 32 Misc. 464, 66 N. Y. Supp. 712, 713 (1900).

"It was not disputed but that the rock could have been removed with much smaller blasts, but it would not have been removed so expeditiously, and there would, in using smaller blasts, have been much less profit to the defendants. The method adopted by the defendants was the usual one for excavating rock and the one most profitable to

Can an individual defendant justify inflicting serious damage upon an individual plaintiff upon the ground that great benefit to the community (to the public at large) has resulted from defendant's conduct? To this question Professor Bohlen makes an effective negative answer.[61]

Certainly a decision in favor of plaintiff, on the ground that defendant's blasting was an unreasonable use of his land, cannot be cited as sustaining the theory of "absolute liability in the absence of fault." And it would seem that the fault may fairly be classed under the general head of negligence, taking that term in its modern and enlarged conception.

We have said:[62]

"In most of the cases where the decision in favor of the plaintiff does not appear to have been based on the existence of negligence; yet it could have been based on that ground; and such a view would not bring about a different result from that which was actually reached."

A striking illustration is afforded by the case of *Rylands* v. *Fletcher*.[63] This reservoir case is the leading English case in favor of absolute liability. The final decision endorses what may be called "The Blackburn Rule," which attempts to lay down a test whereby to determine whether a particular case or act falls under the head of acting at peril.

But

"according to the weight of modern authority, it was unnecessary in that case to decide whether the defendants could be held liable irrespective of negligence. It would seem that the same result (judgment for plaintiff) could have been reached on the ground that the defendants were legally chargeable with negligence. True, the defendants personally were guiltless of negligence. But the engineer and contractors employed by them were negligent; and for the negligence of these persons the defendants

themselves. It is very evident that the defendants in conducting this work had regard only to their own interests. Reasonable care, however, required from them a due regard for the interests of the adjoining property owners." Brown, P. J., in Newell *v.* Woolfolk, 91 Hun (N. Y.), 211, 212, 36 N. Y. Supp. 327 (1895).

[61] 59 Univ. PA. L. REV. 444; and see 17 COL. L. REV. 394–395.

[62] *Ante*, p. 672.

[63] L. R. 3 H. L. 330, 339–340, finally decided in 1868.

were responsible. The duty resting upon the defendants in that case could not be discharged by delegating it to an independent contractor. (As to this last proposition there is some conflict, but the weight of modern authority is strongly in favor of it.) The view that *Rylands* v. *Fletcher* could have been decided on the ground of negligence is supported by Bishop, Street, Bohlen, and Pollock." [64]

The view of Bishop *et als* is endorsed by Professor E. R. Thayer.[65] We may add that the Blackburn Rule "is rejected by what we consider the decided weight of American authority." [66]

Another illustration of a case where the decision *could have been* based on negligence is afforded by the blasting case of *Patrick* v. *Smith*.[67] In a very valuable note on this case, in 27 HARVARD LAW REVIEW,[68] the annotator says: "The defendant had not been negligent." It is true that the trial judge instructed the jury that "it is not necessary to prove negligence on the part of the defendant"; and that the court refused to set aside a verdict for plaintiff rendered under this instruction. But it is also true that there was ample evidence which would have justified the jury in finding the existence of negligence; and that, if the trial judge had charged that negligence was essential to recovery, a verdict for plaintiff could not have been set aside as being against evidence.

We have been comparing two theories, absolute liability and negligence, as foundation reasons for liability in certain cases of blasting; and we have attempted to show that negligence is the better reason. But we have also said that, in the great majority of cases, the result would be the same whichever of the two theories

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[64] BISHOP, NON-CONTRACT LAW, § 839; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 62, 63; Professor Bohlen, 59 Univ. PA. L. REV., 299, note 2; Pollock's Editorial Preface to 143 REVISED REPORTS, v, vi. Pollock adds: "Moreover the case was of the class where '*res ipsa loquitur*'."

The above is taken from an article by the present writer, 30 HARV. L. REV. 409, 410.

[65] E. R. Thayer, "Liability without Fault," 29 HARV. L. REV. 801, 808, *et seq.*

[66] For very explicit decisions, see Losee *v.* Buchanan, 51 N. Y. 476 (1873); Brown *v.* Collins, 53 N. H. 442 (1873); Marshall *v.* Welwood, 38 N. J. L. 339 (1876). See also BURDICK, TORTS, 2 ed., 447; Professor E. R. Thayer, "Liability without Fault," 29 HARV. L. REV. 801, 814; Williams, J., in Gulf & Ry. *v.* Oakes, 94 Texas, 155, 158, 159, 58 S. W. 999 (1900).

[67] 75 Wash. 407, 134 Pac. 1076 (1913).

[68] Pages 188–189.

is adopted. If this be so, why spend so much time in making the comparison? Why not change the title of this paper, and call it "Much Ado About Nothing"? Is not the present writer overscrupulous in insisting on the importance of the distinction, in insisting on giving exactly the correct reason for the result, which might generally be reached on either theory? Does he not remind one of the old New Hampshire lawyer, Peyton R. Freeman, as that gentleman appears in the following anecdote?

Mr. Freeman and Daniel Webster were associated as counsel in a trial. They asked the judge to make a certain ruling, for which they thought there was a good legal reason. The judge began to intimate his opinion; and it was evident that he was about to make the requested ruling, but that he was going to make it for a wrong reason. Freeman jumped up, evidently intending to correct His Honor's erroneous view as to the reason. Webster pulled his colleague's coat tail, saying: "Sit down, Freeman. The judge is going to rule in our favor." Freeman indignantly replied: "I will have my case according to law or I won't have it at all."

Seriously, we believe it extremely important to avoid giving an incorrect reason for a correct doctrine. No doubt it is not uncommon. Indeed, John Stuart Mill says: "Nine-tenths of all the true opinions which are held by mankind are held for wrong reasons." [69] And Judge Holmes has said that judges know which way to decide a good deal sooner than they know how to give the reason why. But a clear perception of the underlying reason is essential to the beneficial working of a correct doctrine; and experienced judges have taken pains to expose "the negation of error upon erroneous grounds." By giving an erroneous reason for a correct rule, we make it difficult thoroughly to understand and apply the rule. "Indeed, the adoption of an erroneous reason for a doctrine inevitably leads to misapplication of the doctrine." [70]

In our prediction [71] as to the rule of the future, it was said that we were "leaving out of sight, for the moment, the influence which modern legislation may have on the views of judges as to the com-

[69] 2 LETTERS OF J. S. MILL, Appendix, 372.

[70] The present writer, 27 YALE L. J. 153, note 41.

[71] 33 HARV. L. REV. 555.

mon law." As to such possible influence, we here reprint substantially what was said in 30 HARVARD LAW REVIEW.[72]

There is modern legislation, enacted almost wholly within the last thirty years, which may indirectly operate to check any further judicial tendency to exonerate in cases of non-culpable accident, and which, conceivably, may even cause courts to reverse the modern common law doctrine that fault is generally requisite to liability. Much of this legislation is of the class usually described as Workmen's Compensation Acts. These statutes create a duty on the part of employers to compensate workmen in many kinds of industry for accidental damage, irrespective of any fault on the part of their employers or their fellow servants. This legislation singles out workmen employed in an undertaking and constitutes them a specially protected class, while overlooking other persons damaged in the same accident whose claim stands on at least equal ground.[73] The result reached in many cases under this legislation is absolutely incongruous with the result reached under the modern common law as to various persons whose cases are not affected by these statutes. The theory underlying most of the statutes, the basic principle, is in direct conflict with the fundamental doctrine of the modern common law of torts.[74] Under these statutes "there is a legal liability without fault, a liability much more extensive than that which grew out of the rule *respondeat superior*, qualified as that was by the fellow servant rule and the theory of assumption of risk." [75] The statutes show "a distinct revulsion from the conception that fault is essential to liability;" a distinct reversion to the earlier conception, that he who causes harm, however innocent, must make it good.[76]

Here is an incongruity between statute law and modern common law as to a matter where each applies to a large class of cases.

Will this incongruity be permitted to continue permanently?[77] What available methods are there for removing it? Is not one conceivable method this: by decisions of the courts, repudiating the modern common law of torts, that fault is generally requisite to liability, and going back to the ancient common law doctrine that an innocent actor must answer for harm caused by his non-culpable conduct? What arguments can be urged to induce courts to make such a change?

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[72] Pages 417–418.

[73] See four examples in 27 HARV. L. REV. 237–238.

[74] See 27 HARV. L. REV. 245–247.

[75] Judge Swayze, "The Growing Law," 25 YALE L. J. 1, 5.

[76] The great majority of these statutes do not purport to apply only to extra-hazardous occupations. See 27 HARV. L. REV. 344–345, 348, 363.

[77] "Such inconsistencies must eventually lead to a change that will assimilate the rules of liability in the different cases." Judge Swayze, 25 YALE L. J. 6.

These questions have been discussed by the present writer, more fully than is possible here, in an article on "Sequel to Workmen's Compensation Acts." [78]

It should be added that, up to date, the courts have not manifested an inclination to repudiate the modern common-law doctrine that fault is generally requisite to liability in tort.

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[78] 27 HARV. L. REV. 235, 344. Special reference may be made to pages 250, 251, 363, first sentence on page 367, and last paragraph on page 368.